

**Office of Chief Counsel
Internal Revenue Service**

memorandum

CC:WR:NCA:SF:TL-N-4817-00

AJKim

VIA FACSIMILE AND REGULAR MAIL

date: August 30, 2000

to: Internal Revenue Service
Northern California District
450 Golden Gate Avenue
San Francisco, CA 94102
Attn: Calvin Yu, Revenue Agent (EG 1232)

from: District Counsel, Northern California, San Francisco

subject:

Proper Entity to Sign Form 872, Consent to Extend the Time to Assess Tax

U.I.L. #: 6501.08-00
6501.08-17

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This advice relies on facts provided by you to our office. If you find that any facts are incorrect, please advise us immediately so that we may modify and correct this advice. This advice is subject to 10-day post review by the National Office. Accordingly, we request that you do not act on this advice until

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we have advised you of the National Office's comments, if any, concerning this advice.

This memorandum is in response to your request for advice concerning the proper entity to execute a consent to extend the statute of limitations on assessment for the taxpayer's [REDACTED] taxable year and the proper language to be used in the consent form.

ISSUE

Where taxpayer [REDACTED] completed a merger with [REDACTED] (a subsidiary of [REDACTED]) on [REDACTED], who is the proper party to sign Form 872 for [REDACTED]'s [REDACTED] taxable year?

CONCLUSION

[REDACTED] is the proper party to sign Form 872 for the [REDACTED] tax year.

FACTS

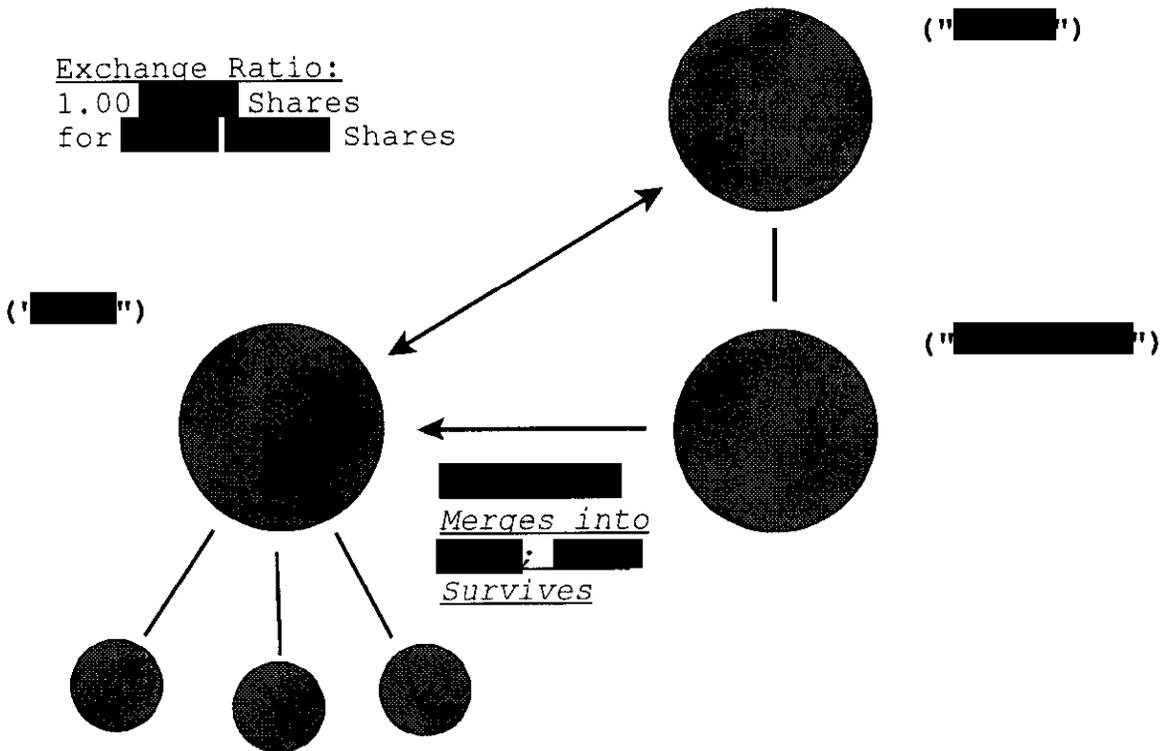
Revenue Agent Calvin Yu has requested that the taxpayer, [REDACTED], execute Form 872 to extend the time within which to assess its Form 1120 corporate income tax liability for taxable year [REDACTED]. [REDACTED] is a holding corporation for several wholly-owned subsidiaries. For the calendar year [REDACTED], [REDACTED] timely filed a consolidated federal tax return with its subsidiaries on [REDACTED]. The statutory period for assessment of [REDACTED]'s Form 1120 corporate income tax liability for taxable year [REDACTED] expires on [REDACTED].

[REDACTED] and [REDACTED] are both California corporations. [REDACTED] ("[REDACTED]"), a wholly owned subsidiary of [REDACTED], is a Delaware corporation.

[REDACTED] entered into a merger agreement dated [REDACTED] with [REDACTED] and [REDACTED] ("Merger Agreement"). Under the terms of the Merger Agreement, [REDACTED] would be merged with and into [REDACTED]. Merger Agreement, § 2.1(a). The separate corporate existence of [REDACTED] would cease and [REDACTED] would continue as the surviving corporation under the laws of the state of California. Merger Agreement, §§ 1.1, 2.1(a). By virtue of the merger, [REDACTED] shareholders received [REDACTED] shares of [REDACTED] common stock for each [REDACTED] common share. Merger Agreement, § 2.2(a). Upon conversion

to [redacted] shares, [redacted] shares were automatically canceled and retired. Merger Agreement, § 2.2(a). Additionally, each [redacted] common share was converted into one common share of [redacted] Merger Agreement, § 2.2(e). On [redacted] the merger between [redacted] and [redacted] was completed. See Illustration, below. Post-merger, [redacted] ceased to be the common parent of the [redacted] and Subsidiaries consolidated group.

Illustration of Merger



LEGAL ANALYSIS

California state law provides that upon a merger of two or more constituent corporations:

the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.

California Corporations Code, § 1107(a). Under California state law, [redacted] succeeded to and became primarily liable for the tax

liabilities of [REDACTED] when [REDACTED] merged into [REDACTED]. California Corporations Code, § 1107(a).

In this case, where the common parent [REDACTED] remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Treas. Reg. §§ 1.1502-77(a); 1.1502-77T(a)(1). Treas. Reg. § 1.1502-77(a) provides, in part, as follows:

The common parent...shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year...

Temp. Reg. § 1.1502-77T, which was promulgated in 1988 by the Service to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a).¹ Where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations. Pursuant to Temp. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as "alternative agents" for the group:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which §381(a) applies,
- (iii) The agent designated by the group under section 1.1502-77(d), or
- (iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

¹Temp. Reg. § 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. §1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. § 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. § 1.1502-77T.

Temp. Reg. § 1.1502-77T(a)(4)(i) provides as an "alternative agent" the common parent of the group for all or any part of the year to which the notice or waiver applies. [REDACTED] was the common parent of the consolidated group for tax year [REDACTED] to which the waiver applies. [REDACTED] still exists post-merger. Therefore, [REDACTED] is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) with respect to the consolidated group for the group's [REDACTED] tax year. Treas. Reg. § 1.1502-77(a). This is true even though [REDACTED] no longer acts as the common parent of [REDACTED] and subsidiaries. Id.; Temp. Reg. § 1.1502-77T(a)(4)(i).

Who May Sign the Form 872

Under I.R.C. § 6501(c)(4), a taxpayer and the Internal Revenue Service may consent in writing to extensions of the time for making assessments. The regulations under section 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service will generally apply the rules applicable to execution of the original returns to consents to the extension of time to make an assessment.

Section 6062 of the Code provides, generally, that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return.

Based on our legal analysis, we recommend:

- captioning the Form 872 as follows:

[REDACTED]
 [REDACTED]
 successor in interest to [REDACTED]
 [REDACTED]
 _____)*

- inserting language at the bottom page of the Form 872 as follows:

*This is respect to the consolidated return liability of [REDACTED] consolidated group for the tax year [REDACTED].

- securing the signature of an authorized officer of [REDACTED] on the signature block on Form 872 and noting on the signature block on page 2 of Form 872 as follows:

[name of current officer]

[title of officer]

[REDACTED]
[REDACTED], successor in interest
to [REDACTED]

- inputting the E.I.N. of [REDACTED] in the box on the Form 872 labeled "SSN or EIN".
- confirming that [REDACTED] is still in existence when the Form 872 is secured from this entity.

Additionally, at the time Form 872 is presented to the taxpayer for execution, please notify the taxpayer that the taxpayer may (1) refuse to extend the period of limitations or (2) limit the extension to particular issues or to a particular period of time. I.R.C. § 6501(c)(4)(B). The statutory notice requirement under I.R.C. § 6501(c)(4)(B) generally applies to requests to extend the period of limitations made after December 31, 1999.

Should you have any questions, please contact attorney Anthony J. Kim at (415) 744-9217 ext. 144.

BARBARA M. LEONARD
Acting District Counsel

By: _____/s/_____
THOMAS G. SCHLEIER
Assistant District Counsel